Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

In re H. Gerard Heimbecker, Petitioner

H. Gerard Heimbecker,
Plantiff-Petitioner,

v.

555 ASSOCIATES; 555 INVESTORS, L.P.; RONALD RUBIN;
FAITH ET FILS, INC.; FAITH ROBBINS;
DALE MULARTRICK; JAMES REMENTER; GERALD ARTH, ESQUIRE;
FOX ROTHSCHILD O'BRIEN & FRANKEL ; DENIS DICE, ESQUIRE;
HARVEY PENNINGTON CABOT, GRIFFITH & RENNEISEN, LTD.;
CNA FINANCIAL, INC; TRANSPORTATION INSURANCE COMPANY;
CONTINENTAL CASUALTY COMPANY AND
JOSEPH T. F. QUINN, ESQUIRE,
DEFENDANTS-RESPONDENTS.

PETITION FOR WRIT OF MANDAMUS
FROM THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF MANDAMUS

H. GERARD HEIMBECKER
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Honorable Legrome D. Davis, United States District Court Judge for the Eastern District of Pennsylvania, abused his discretion in failing to disqualify himself under 28 U.S.C. §455(a) and (b)(4) and 28 U.S.C. §144.

2. Whether the Third Circuit Court of Appeals decision, when it determined ". . . we believe that a reasonable person would not view Judge Davis' alleged connections with the defendants as evidencing or creating an appearance of impartiality," but denied the writ of mandamus, is in conflict with this Court and other circuits court of appeals.

PARTIES

H. Gerard Heimbecker
Plaintiff-Petitioner

The Honorable Legrome D. Davis
United States District Court for the Eastern District of Pennsylvania
Respondent

555 Associates; 555 Investors, L.P.; Ronald Rubin; Faith et Fils, Inc.; Faith Robbins; Dale Mulartrick; James Rementer; Gerald Arth, Esquire; Fox Rothschild Frankel & O'Brien ;
Defendants

Gerald Arth, Esquire
Counsel for Defendants

Denis Dice, Esquire and Harvey Pennington Cabot, Griffith & Renneisen, Ltd.
Defendants

Samuel Pace, Esquire
Counsel for Defendants

CNA Financial, Inc; Transportation Insurance Company and Continental Casualty Company
Defendants

Geoffrey Kahn, Esquire
Counsel for Defendants

Joseph T.F. Quinn, Esquire,
Defendant

Henry Clinton, Esquire
Counsel for Defendant

TABLE OF CONTENTS

Question Presented for Review i
Parties ii
Table of Contents iii
Table of Authorities iv
Prior Opinions vii
Jurisdiction vii
Constitutional Provisions vii
Statutes Involved viii
Statement of the Case 1
Reasons for granting the Writ 11

A. The Guarantee of an Impartial Judge is Fundamental to the Constitutional Right to Procedural Due Process and When Enforced, Ensures a Fair and Effective Judicial System 11

B. In Applying the Relevant Standards for Recusal, Disqualification is Appropriate When the Charges are Supported By Facts Providing a Reasonable Basis to Doubt the Judge's Impartiality 14

C. To Insure Freedom from Both Bias-in-Fact and the Appearance of Bias, Congress has Adopted Two Alternate and Independent Statutes Which Require Judicial Disqualification for Bias, 28 U.S.C.§144 and 28 U.S.C.§455 15

D. Recusal is Necessary Pursuant to §455 because the Facts Presented Would Lead a Reasonable Person to Infer Bias or Prejudice Exists Foreclosing Impartiality of Judgment 18

E. Recusal is Essential Pursuant to §144 because the Court conduct has Manifested Personal Bias and Prejudice 19

F. The Failure of the Trial Court and the Third Circuit Court of Appeals to Comply with §144 and §455 Irreparably Harms the Public Confidence in the Judiciary 23
Conclusion 25
Appendix ..... 1a to 55a

TABLE OF AUTHORITIES

CASES: Page(s)
Alexander v. Primercia Holdings, Inc.,
10 F.3d 155 (3d Cir. 1993) 24
Allen-Myland v. International Business Machines Corp.,
709 F.Supp. 491 (S.D.N.Y. 1989) 21
Apple v. Jewish Hospital and Medical Center,
829 F.2d 326 (2d Cir. 1987) 19, 20, 21
Baker v. City of Detroit,
458 F.Supp. 374 (S.D. Mich. 1987) 19
Berger v. United States,
255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) 21, 22
Bolin v. Story,
225 F.3d 1234 (C.A. 11th (2000) 18
Davis v. Board of School Comm'rs,
517 F.2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) 22
Davis v. Cities Service Oil Co.,
420 F.2d 1278 (10th Cir. 1970) 21
Haines v. Liggett Group, Inc.,
975 F.2d 81 (3d Cir. 1992) 11
Ex parte American Steel Barrel Co. and Seaman,
230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379 (1913) 20, 21
In re Asbestos Litigation,
977 F.2d 764 (3rd Cir. 1992) 24
In re Drexel Burnham Lambert, Inc.,
861 F.2d 1307 (2d Cir. 1988) 14
In re International Business Machines Corp.,
618 F.2d 923 (2d Cir. 1980) 19, 21, 22

In re Larson,
43 F.3d 410 (8th Cir. 1994) 19
In re Martin Trigona,
573 F.Supp. 1237 (D.Conn. 1983) 20
In re Murchison,
349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 11, 12
In re San Juan Dupont Plaza Hotel Fire Litigation,
129 F.R.D. 409 (D. Puerto Rico 1989) 20
In re United States,
158 F.3d 26 (1st Cir. 1998) 14
In re United States,
666 F.2d 690 (1st Cir. 1981) 14
Joint Anti Fascist Committee v. McGrath,
341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) 12
King v. United States,
576 F.2d 432 (2d Cir. 1978) 21
Laird v. Tatum,
409 U.S. 824, 93 S.Ct. 7, 34 L.Ed 2d 50 15
Liljeberg v. Health Serv. Acquisition Corp.,
486 U.S. 847 (1988) 16, 23, 24
Liteky v. United States,
510 U.S. 540, 114 S.Ct. 1147,
127 L.Ed.2d 474 (1994) 18
Lovoi v. Treasure Chest Casino,
(1998 WL 1986950 E.D. La.) 18
Marshall v. Jerrico,
466 U.S. 238, 1005 S.Ct. 1610,
64 L.Ed.2d 182 (1980) 11
Mathews v. Eldridge,
424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 11
McCann v. Communications Design Corporation,
775 F. Supp. 1506 (D. Conn. 1991) 21
McWhorter v. City of Birmingham,
917 F.2d 570 (C.A. 11th 1990) 18
MDCM Holdings, Inc. v.
Credit Suisse First Boston Corp.,
205 F.Supp.2d 158 (D.C.N.Y. 2002) 18
Microsoft Corporation v. United States, et al,
530 U.S. 1301, 121 S.Ct. 25,
147 L.Ed.2d 1048 (2000) 18

Nichols v. Alley,
71 F.3d 347 (10th Cir. 1995) 14
Peckham v. Ronrico Corp.,
288 F.2d 841 (1st Cir. 1961) 21
Potashnick v. Port City Constr.Co.,
609 F.2d 1101 (5th Cir.),
cert. denied, 449 U.S. 820 ..... 16, 18
Robert v. Bailar,
625 F.2d 125 (6th Cir. 1980) 16
State of Idaho v. Freeman,
478 F.Supp. 33 (D. Idaho 1979) 19
United States v. Antar,
53 F.3d 568 (3d Cir. 1995) 19
United States v. Burger,
964 F.2d 1065 (10th Cir. 1992) 14
United States v. Cooley,
1 F.3d 985 (10th Cir. 1993) 23, 24
United States v.
Columbia Broadcasting Systems Inc.,
497 F.2d 107 (5th Cir.) 12
United States v. Conforte,
457 F.Supp. 641 (D. Nev. 1978) 19
United States v. Corr,
434 F.Supp. 408 (S.D.N.Y. 1977) 19
United States v. Grinnell Corp.,
384 U.S. 563 (1996) 16, 19, 22
United States v. Miranne,
688 F.2d 980 (5th Cir. 1982) 18
United States v. Nathan,
188 F.3d 190 (3d Cir. 1999) 11
United States v. Smith,
997 F.2d 674 (10th Cir. 1993) 14
United States v. State of Alabama,
2 F.2d 1532, 1541 (11th Cir. 1987), ***cert. denied sub nom., Board of Trustees of Alabama State University v. Aubrun University,***
108 S.Ct. 2857 (1988) 23
Ward v. Village of Monroeville,
409 U.S. 57 1972 12

Weatherhead v. Globe,
832 F.2d 1226 (10th Cir. 1987) 14
Webbe v. perpetuating Land Title Co.,
549 F.2d 1358 (10th Cir. 1977) 12

STATUTES:

28 U.S.C.§453 15
28 U.S.C.§1651(a) viii
28 U.S.C.A.§144 ..... 8, 12, 15, 16, 19, 22, 24
28 U.S.C.A.§455(a) and (b)(1) 8, 12, 14, 24
28 U.S.C.§1331 viii

RULES AND REGULATIONS:

F.R.A.P.21(a) and (b)(4) ..... viii, 10

LEGISLATIVE MATERIAL:

H.R.Rep.No. 93-1453,p.5 (1974) 12, 16, 23
H.R.Rep. No.93-419,p.5 (1973) 27

MISCELLANEOUS:

Frances Kahn Zemans, The Accountable Judge:
Guardian of Judicial Independence,
72 S.Cal.L.Rev. 625, 646 (1999) 11

13A Charles A. Wright et al.,
Federal Practice and Procedure §3542
at 557 (1984, Supp. 1992 and Supp. 2003) 18

Model Code of Judicial Conduct 3E (1990) 17
Canon 2A, Code of Conduct for
United States Judges 23

PRIOR OPINIONS

The opinions whose review are sought are unpublished and are reproduced in the appendix. The District Court opinion is reproduced in the Appendix at 2a. The Third Circuit Court of Appeals opinion is reproduced in the Appendix at 9a.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on January 29, 2003 by the United States Circuit Court of Appeals for the Third Circuit, by a Petition for Writ of Mandamus pursuant to the jurisdiction conferred by 28 U.S.C. §1651(a). This petition is timely filed in that it was mailed within ninety days of January 29, 2003, the date the petition for mandamus was denied in the court below. Rules 13.1 and 29.2.

Jurisdictional basis for the Third Circuit is 28 U.S.C.§1651(a) and Fed.R.App.P.21(a) and for the District Court is 28 U.S.C.§1331

CONSTITUTIONAL PROVISIONS

Article V, United States Constitution in pertinent part provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution, in pertinent part provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 455 of title 28 United States Code, states in pertinent part:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

He shall also disqualify himself in the following circumstances.

(1) Where he has a personal bias or prejudice concerning a party . . ..

Section 144 of title 28 United States Code states :

Whenever a party to any proceeding in a district court makes or files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT OF THE CASE

Petitioner/plaintiff, H. Gerard Heimbecker, (hereinafter alternatively, "Mr. Heimbecker and /or petitioner/plaintiff"), initiated this proceeding on July 10, 2001 by filing a writ of summons, captioned ***Heimbecker v. 555 Associates, et al,*** Court of Common Pleas Delaware County, No. 01-7821. Mr. Heimbecker seeks recovery of monetary damages under several theories against the named defendants, including breach of contract; breach of the duty of good faith and fair dealing; and violations of the Civil Racketeer Influenced and Corrupt Organization Act, "RICO" under Sections 1962(a); 1962(b); 1962(c) and 1962(d). The complaint meticulously chronicles every scheme, and the ease with which the defendants and their attorneys compromised and subverted the system.

Mr. Heimbecker was served on December 14, 2001 with a Motion to Dismiss filed by defendants, 555 Associates; 555 Investors, L.P.; Ronald Rubin; Faith et Fils, Inc.; Faith Robbins; Dale Mulartrick; James Rementer; Gerald Arth, Esquire and Fox Rothschild O'Brien and Frankel, (hereinafter, "the Fox defendants") who are represented by Fox Rothschild Frankel and O'Brien, (hereinafter, "the Fox firm"). A second Motion to Dismiss was filed by defendants, Denis Dice, Esquire and Harvey Pennington Cabot Griffith and Renneisen, (hereinafter collectively "the Dice defendants"), who are represented by Dugan Brinkmann McGinnis and Pace (hereinafter, "Dugan Brinkmann"). A third Motion to Dismiss was filed by the defendants, CNA Financial, Inc., Transportation Insurance Company and Continental Casualty Insurance Company, (hereinafter, collectively, "the CNA defendants"), who are represented by the law firm of Ballard Spahr Andrews and Ingersoll, (hereinafter, "Ballard Spahr").

On December 31, 2001 Mr. Heimbecker filed a collective response to the three Motions to Dismiss. On March 28, 2002, defendant Joseph T. F. Quinn, (hereinafter, "defendant Quinn"), filed a Motion to Dismiss to which Mr. Heimbecker responded on April 11, 2002.

The Fox firm acted to remove the case from state to federal court and it was initially assigned to the Honorable Stewart Dalzell in December 2001. On May 23, 2002 the Clerk of Courts, at the direction of Chief Judge James T. Giles, ordered the case reassigned to the Honorable Legrome D. Davis, (hereinafter, "Judge Davis").

Judge Davis was a recent appointment to the federal bench receiving his commission on April 23, 2002. Unfamiliar with Judge Davis or his professional background, Mr. Heimbecker initiated a standard conflict check. An article in *The Legal Intelligencer*, dated January 24, 2002 entitled "Six Nominated For Federal Bench Seats" by Shannon P. Duffy, stated Judge Davis had been an associate at Ballard Spahr. The CNA defendants are represented by Ballard Spahr, thereby raising the issue of disqualification.

Further clarification of Judge Davis' relationship with Ballard Spahr was required. A review of the Pennsylvania Manual did not disclose Judge Davis' employment with Ballard Spahr. Since Judge Davis was newly confirmed, Mr. Heimbecker obtained Judge Davis' resume from the website of the United States Department of Justice, Office of Legal Policy, which failed to reveal his employment with Ballard Spahr. In order to determine whether the failure to list the Ballard Spahr employment was an error on the part of the Office of Legal Policy, Mr. Heimbecker contacted said office and was advised Judge Davis provided and verified the information. Further, the Office of Legal Policy confirmed the posting was accurate. Consequently, Judge Davis specifically omitted any reference to his Ballard Spahr employment. Mr. Heimbecker continued to search and obtained a 1999 *White House Press Release* which stated Judge Davis was a former associate at Ballard Spahr.

Concerned with the appearance of prejudice and bias that Judge Davis' contacts with a law firm so entrenched in this litigation presented, Mr. Heimbecker filed a Motion for Recusal pursuant to 28 U.S.C.A. §455. This motion was timely filed on May 27, 2002, five days after the case was reassigned and before Judge Davis made any decisions. By

order dated July 3, 2002 Judge Davis denied the Motion for Recusal, but admitted to his employment with Ballard Spahr. In his order, Judge Davis stated ". . .the previous contact between this court and the Ballard Spahr law firm . . . are extremely attenuated . . .". (App. at 9a). Also, it should be noted, Judge Davis went to great lengths addressing the issue of his former law-clerk who was married to the Ballard Spahr attorney representing the CNA defendants. This issue was never raised by Mr. Heimbecker. An examination of Judge Davis' "extremely attenuated" contacts with Ballard Spahr revealed a long term and continuous relationship with Edward G. Rendell, Esquire (hereinafter, "Mr. Rendell"). This year Mr. Rendell resigned as a partner of Ballard Spahr the day he was sworn in as Governor of the Commonwealth of Pennsylvania. Further, Mr. Rendell is the former General Chair of the Democrat National Committee, former Mayor of the City of Philadelphia and former District Attorney of the City of Philadelphia.

In 1978, then District Attorney Rendell appointed Judge Davis as an Assistant District Attorney. Mr. Rendell reappointed Judge Davis in 1981, a position he held until 1987. Following his tenure with District Attorney Rendell, Judge Davis was employed by the Office of General Counsel, University of Pennsylvania. Coincidentally, Mr. Rendell is not only an alumnus of the University of Pennsylvania, but also an instructor of government and politics courses at the University.

Furthermore, in July 1987 while running for the Philadelphia Court of Common Pleas, Judge Davis was employed by Mr. Rendell's law firm, Ballard Spahr, which made significant financial contributions to Judge Davis' election campaign. Following Judge Davis' election to the bench, then Mayor Rendell appointed Judge Davis as Chairperson of the Task Force on Alternatives to Incarceration.

A further conflict was brought to Judge Davis' attention. Specifically, this RICO action alleges Louis Fryman Esquire, (hereinafter, "Fryman"), Chairman of the Fox firm, conspired with the named defendants to obstruct justice and

suborn perjury at a district justice court on June 1, 1995. The results of the criminal hearing, which concerned the unlicenced real estate activity by the Rubin Organization, were later employed to perpetuate a scheme to defraud Mr. Heimbecker through his insurance policy. Consequently, as a result his personal involvement in the underlying events, Fryman is a witness in the present litigation.

Fryman holds a politically prominent position in Pennsylvania politics. He was Chairman of the Judicial Retention Election Sub-Committee of the Pennsylvania Bar Association; a member of the Special Committee on Judicial Selection and Reform of the Philadelphia Bar Association; a member of the Federal Courts Committee; a member of the Commission for Judicial Selection and Reform of the Senate of the Commonwealth of Pennsylvania and is presently Chairman of the Ethics Commission for the Commonwealth of Pennsylvania.

In 1996 and 1997, Fryman was appointed by United States Senators Arlen Specter and Rick Santorum to the Federal Judicial Nominating Commission of Pennsylvania. In 1997 through 2001, Judge Davis participated in the selection process before the same Commission. When this issue was presented to the Third Circuit Court of Appeals, the court questioned, ". . .whether [Fryman] personally kn[ew] Judge Davis, whether [Fryman] served on the Commission while Judge Davis was being considered, or whether [Fryman] made any decision, favorably or unfavorably, concerning Judge Davis' recommendation." (App. at 6a). When asked, Fryman failed to provide the answers. (App. at 49a). The extent of the relationship between Judge Davis and Fryman, i.e. whether Fryman personally recommended Judge Davis to his present life time appointment to the federal bench, is information both Judge Davis and Fryman possess, have a duty to disclose and have failed to do so.

To complete the circle, Ronald Rubin, a defendant in this action, was represented by Fryman in the criminal hearing on June 1, 1995 for real estate licencing violations. Rubin is the chairman of the Pennsylvania Real Estate Investment

Trust, which donated $245,000.00 to Mr. Rendell over the past three years.

Finally, Fryman is both the former law partner of the Honorable Edward R. Becker, Chief Judge of the Third Circuit Court of Appeals, as well as his brother-in-law. When asked to confirm the former professional and personal relationships, both Fryman and Judge Becker failed to come forward. (App. at 49a and 51a).

Rather than supporting Judge Davis' assertion of an "extremely attenuated" relationship, the information gleaned by Mr. Heimbecker substantiated the existence of long term relationships between Judge Davis, Ballard Spahr, Rendell and Fryman requiring disqualification. On July 20, 2002 Mr. Heimbecker filed a Motion for Reconsideration raising all the additional conflicts. On July 22, 2002 Judge Davis denied the Motion for Reconsideration before the Motion was even docketed. (App. at 8a).

Judge Davis' precipitous action, indicative of anger at being challenged, transforms his status from the appearance of prejudice and bias, to actual prejudice and bias. The question arose, why would a newly minted judge, when presented with such obvious conflicts, refuse to disqualify himself from presiding on this particular case. It became clear Judge Davis' misrepresented his relationship with Ballard Spahr. Further, Judge Davis went to great lengths to downplay, even hide, this relationship. Disqualification in this case may require recusal in future Ballard Spahr cases.

Seeking appellate review of Judge Davis' denial of the Motion to Recuse, on July 26, 2002 Mr. Heimbecker filed a Writ of Mandamus to the Third Circuit Court of Appeals, expecting the appellate court to recognize the appearance of partiality created by Judge Davis continuing to preside in this matter.

The Third Circuit, in reviewing Judge Davis' refusal to disqualify himself, agreed with the position set forth by Mr. Heimbecker, stating, ". . . we believe that a reasonable person would not view Judge Davis' alleged connections with the defendants as evidencing or creating an appearance of

impartiality," but then proceeded to deny the writ of mandamus. (App. at 6a). Since it is every litigant's right to have his case decided impartially by an independent judiciary, free from the appearance of prejudice and bias, the decision of the Third Circuit in allowing Judge Davis to remain on this case, seriously jeopardized Mr. Heimbecker's Constitutional right to procedural due process through the Fifth and the Fourteenth Amendments.

In the meantime, during the process of confirming Judge Davis' employment with Ballard Spahr, Mr. Heimbecker obtained a copy of the sworn questionnaire Judge Davis submitted to the Committee On The Judiciary of the United States Senate. (App. at 24a). Judge Davis swore he "...represented the interests of Raymark Corporation, a manufacturer of asbestos cloth, in depositions and trials in state and federal courts" during his employment with Ballard Spahr. (App. at 24a). Basically, Judge Davis' claim of "extremely attenuated contacts", as told to the United States Senate, would be his brief representation of this one client. One can not but help to question, when Judge Davis' legal experience consisted of nine years of criminal law, no known civil experience, he was suddenly trial counsel for Ballard Spahr in a major class action asbestos litigation in state and federal court. To quote former President Ronald Reagan, "[t]rust but verify."

Exhaustive measures were taken in an attempt to verify Judge Davis' sworn statements concerning his contacts with Ballard Spahr. A comprehensive search of the state and federal dockets did not reveal any entry of appearance by attorney Davis on behalf of Raymark Corporation.

By letter dated October 12, 2002 Mr. Heimbecker presented a simple request to Judge Davis, provide the docket numbers and dates of his court appearances in the trials in state and federal courts where he appeared as the lead counsel for Ballard Spahr. (App. at 20a). Judge Davis failed to respond. By letter dated November 16, 2002, Mr. Heimbecker reiterated his request. (App. at 23a). By letter dated November 18, 2002, a law clerk to Judge Davis stated, while

the writ of mandamus was pending before the Third Circuit Court of Appeals, "... *attempts to communicate directly with Judge Davis should be discontinued.*". (App. at 26a). Mr. Heimbecker, to his detriment, complied with the directive. Following the denial of the writ of mandamus on November 29, 2002, Mr. Heimbecker requested the information on February 26, 2003 to which Judge Davis failed to respond. (App. 52a).

Traditionally, the chief circuit judge is responsible for investigating judicial misbehavior. Pursuant to Judicial Misconduct Rule 19(A), and by letter dated November 27, 2002 Mr. Heimbecker advised the Honorable Edward R. Becker, Chief Judge of the Third Circuit Court of Appeals of Judge Davis' failure to provide the docket numbers and dates which would assure Mr. Heimbecker the contacts with Ballard Spahr were, in fact, "extremely attenuated."

(App. at 27a). Judge Becker failed to respond. By letter dated December 2, 2002 Mr. Heimbecker informed Judge Becker it was essential he receive the requested information, as he intended to file a Petition for Panel Rehearing. (App. at 30a). Judge Becker failed to respond. By letter dated December 7, 2002 Mr. Heimbecker again requested the information. (App. at 33a). Instead, he received instructions and forms from the Office of the Clerk for the Third Circuit Court of Appeals to file a complaint against Judge Davis, stating the Chief Judge "declines to consider your submissions under the authority of the more general Rule 19(A)." (App. at 35a). In order to submit the complaint, Mr. Heimbecker still needed the information. By letter dated December 30, 2002 Mr. Heimbecker again requested Judge Becker to provide the information. (App. at 38a). Judge Becker failed to respond.

Mr. Heimbecker, in searching the dockets, determined Arthur Makadon, Esquire (hereinafter, "Makadon") represented Raymark Corporation during Judge Davis' tenure at Ballard Spahr. By letter dated January 2, 2003 Mr. Heimbecker requested Makadon, Chairman of Ballard Spahr, to provide the docket numbers and dates. (App. at 40a). By letter dated January 6, 2003, another attorney from

Ballard Spahr responded on behalf of Makadon stating they, ". . . do not believe any useful purpose will be served by an exchange of correspondence between the parties." (App. at 42a). Mr. Heimbecker reiterated his request for the information from Makadon by letters dated January 8 and 27, 2003. (App. at 43a and 46a). Makadon failed to provide the information.

On December 13, 2002 Mr. Heimbecker filed a Petition for Panel Rehearing of the denial of the writ of mandamus. On January 29, 2003 the three judge panel, who received copies of all the aforesaid letters seeking the information clarifying Judge Davis "contacts" with Ballard Spahr, determined ". . . a reasonable person would not view Judge Davis' alleged connections with the defendants as evidencing or creating an appearance of [fairness]", but denied Mr. Heimbecker's Petition for Panel Rehearing. (App. at 1a).

No information exists in the public record to verify the representation Judge Davis made to the United States Senate in his sworn questionnaire regarding his affiliation with Ballard Spahr. It is obvious by the incriminating silence of Judge Davis, Judge Becker and Makadon, there are no docket numbers which reflect Judge Davis ". . . represented the interests of Raymark Corporation . . . in depositions and trials in state and federal courts". If true, the failure of Judge Davis to provide the information, Judge Becker to obtain the information and Makadon to produce the readily available docket numbers, reflects a dereliction of each man's duty to discharge their respective oaths. Under these circumstances, the only conclusion a reasonable person can draw is Judge Davis materially misrepresented his employment at Ballard Spahr to the United States Senate and Ballard Spahr is perpetuating that misrepresentation. Hence, Judge Davis' failure to provide the assurance his relationship with Ballard Spahr was, in fact, "extremely attenuated" demonstrates an actual prejudice and bias requiring disqualification pursuant to 28 U.S.C.A §144 and sua sponte disqualification under 28 U.S.C.A.§455(b)(1). Consequently, Mr. Heimbecker filed a Motion to Recuse pursuant to 28 U.S.C.A.§144 on January 31, 2003.

On January 30, 2003 Judge Davis, with jurisdiction restored, issued an order denying a motion pending since December 24, 2001, followed by an order dated February 3, 2003 denying Mr. Heimbecker's Motion for Remand to Delaware County.

Moreover, on February 4, 2003 Judge Davis scheduled oral argument on the Motion to Recuse and the Motions to Dismiss. On February 5th Mr. Heimbecker received a telephone call from Gerald Arth, Esquire, of the Fox firm, requesting the hearing be reschedule to a later date, to which he agreed. Mr. Heimbecker also received a call from Marcella El-Shabazz, Judge Davis's Courtroom Deputy, regarding the same matter. On February 11, 2003, a notice was docketed scheduling oral argument for March 5, 2003.

If Judge Davis denied the motion to recuse, Mr. Heimbecker intended to seek appellate review. Obviously, by scheduling both arguments concurrently, Judge Davis intended to deny Mr. Heimbecker any opportunity to seek such review. Accordingly, to protect his appellate rights, on February 15, 2003 Mr. Heimbecker filed a Motion to Stay, requesting argument be limited to the Motion to Recuse. On February 27, 2003 Judge Davis denied the Motion to Stay and ordered oral argument on both motions to proceed as scheduled on March 5, 2003.

Seeking appellate review of this decision, Mr. Heimbecker filed a Petition for Writ of Mandamus to the Third Circuit Court of Appeals on March 2, 2003. As a result, the issue of whether the March 5th hearing should go forward rested with the Third Circuit Court of Appeals. Previously, by letter dated November 18, 2002, Judge Davis instructed Mr. Heimbecker, while a writ of mandamus was pending with the Third Circuit Court of Appeals, any ". . . attempt[] to communicate directly with Judge Davis should be discontinued." (App. at 26a). Mr. Heimbecker received no communication from either Judge Davis' courtroom deputy or any other member of Judge Davis' staff indicating Judge Davis would be proceeding with the March 5th hearing.

Notwithstanding the fact jurisdiction rested with the Third Circuit Court of Appeals, Judge Davis held the hearing on March 5th without Mr. Heimbecker. At that hearing, Judge Davis advised the defendants' various counsel, who for some reason did know the hearing would go forward, "[m]y staff has communicated with the 3rd Circuit and we're here today with the understanding and agreement of the 3rd Circuit". (App. at 18a). Judge Davis' communication with the Third Circuit Court of Appeals violates F.R.A.P.21(b)(4) which states in part, "[t]he trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals." Id. Mr. Heimbecker is unaware of any order from the court of appeals inviting the respondent, Judge Davis, to communicate with the court concerning the status of the writ of mandamus and the March 5th hearing.

Clearly jurisdiction rested with the appellate court and guided by Judge Davis' prior instructions Mr. Heimbecker did not attend the March 5th hearing. In his absence, Judge Davis engaged in ex parte communication with the court of appeals and summarily dismissed Mr. Heimbecker's case. Consequently, such conduct is an egregious violation of Mr. Heimbecker's procedural due process rights under the Constitution, that, in and of itself, justifies disqualification.

On March 27, 2003, with jurisdiction still reposing with the Third Circuit Court of Appeals, Judge Davis entered an order dismissing Mr. Heimbecker's case in its entirety. Judge Davis' Memorandum displays a level of antipathy toward Mr. Heimbecker which affected his ability to apply the law. For example, instead of accepting all well plead facts as true, Judge Davis portrayed the outrageous conduct of attorneys Quinn and Dice, as set forth in Mr. Heimbecker's complaint, as the conduct of Mr. Heimbecker rather than that of his attorneys. In doing so, Judge Davis acknowledged the conduct of Quinn and Dice was egregious but then proceeded to dismiss Mr. Heimbecker's case.

REASONS FOR GRANTING THE WRIT

A. The Guarantee of an Impartial Judge is Fundamental to the Constitutional Right to Procedural Due Process and When Enforced, Ensures a Fair and Effective Judicial System.

The caption inscribed above the Supreme Court building reads, "Equal Justice Under the Law". The Constitution ensures this concept embodies the guiding principles of our society. In doing so, it is essential, an individual's case should be decided impartially by an independent judiciary with decisional independence." ***See*** Frances Kahn Zemans, ***The Accountable Judge: Guardian of Judicial Independence,*** 72 S.Cal.L.Rev. 625, 646 (1999).

It is well settled, the Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. "An impartial judge is a basic due process requirement." ***United States v. Nathan,*** 188 F.3d 190, 216 (3d Cir. 1999), ***citing Alexander v. Primercia Holdings, Inc.,*** 10 F.3d 155 (3d Cir. 1993); ***Haines v. Liggett Group, Inc.,*** 975 F.2d 81, 98 (3d Cir. 1992). In the case of ***In re Murchison,*** 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), Justice Black wrote: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to present even the probability of unfairness." ***Id.***

"[The] requirement of neutrality, . . . safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.". ***Marshall v. Jerrico,*** 466 U.S. 238, 242, 1005 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980).

> The neutrality requirement helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. ***See Mathews v. Eldridge,*** 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18

(1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," ***Joint Anti Fascist Committee v. McGrath,*** 341 U.S. 123, 172 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. at 242-43.

A guarantee of an impartial judge is essential to a fair and effective judicial system. ***Ward v. Village of Monroeville,*** 409 U.S. 57, 62 (1972) (Constitution requires a neutral and detached judge); ***In re Murchison,*** 349 U.S. at 136 (1955). In addition to guarding against judicial bias-in-fact, Congress has been vigilant to ensure the "appearance of impartiality." H.R. Rep.No. 1453, 93d Cong., 2d Sess.1, reprinted in 1974 U.S.C.C.A.N., 6351,6354 ("House Report"). "[T]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." ***Potashnick v. Port City Constr.Co.,*** 609 F.2d 1101, 1111 (5th Cir.), ***cert. denied,*** 449 U.S. 820 (1980) (***quoting United States v. Columbia Broadcasting Systems Inc.,*** 497 F.2d 107, 109 (5th Cir.); ***see also Liljeberg v. Health Serv. Acquisition Corp.,*** 486 U.S. 847, 865 (1988) ("it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality").

The "appearance of impartiality is virtually as important" to the smooth functioning of a fair judicial system as is the fact of impartiality. ***Webbe v. McGhie Land Title Co.,*** 549 F.2d 1358, 1361 (10th Cir. 1977). To insure freedom from both bias-in-fact and the appearance of bias, Congress has adopted two alternate and independent statutes which require judicial disqualification for bias, 28 U.S.C. §144 and 28 U.S.C. §455.

When Judge Davis was initially assigned to preside in this matter, Mr. Heimbecker's primary concern was the appearance of prejudice and bias a reasonable person would perceive for several reasons. First, Judge Davis has significant financial ties to Ballard Spahr. Those ties involve financial contributions to his campaign for the Court of Common Pleas and the financial support Judge Davis received in the form of employment, while a candidate. Second, Mr. Rendell has obviously been a mentor to Judge Davis throughout his entire career and a reasonable person would perceive a debt owed to a partner in a law firm and the law firm itself as inseparable. Third, Judge Davis' reliance on Fryman's support in seeking a life time appointment to the federal bench can not be ignored.

To complete the circle, Ronald Rubin, a defendant in this action, was represented by Fryman in the criminal hearing on June 1, 1995 for real estate licencing violations. Rubin is the chairman of the Pennsylvania Real Estate Investment Trust, which donated $245,000.00 to Mr. Rendell over the past three years. Taken as a whole, these facts present the appearance of prejudice and bias requiring disqualification.

The Third Circuit, in reviewing Judge Davis' refusal to disqualify himself, agreed with the position set forth by Mr. Heimbecker, stating, ". . . we believe that a reasonable person would not view Judge Davis' alleged connections with the defendants as evidencing or creating an appearance of impartiality,"(app. at 6a), but then proceeded to deny the writ of mandamus. Since it is every litigant's right to have his case decided impartially by an independent judiciary, free from the appearance of prejudice and bias, the decision of the Third Circuit in allowing Judge Davis to remain on this case, seriously jeopardized Mr. Heimbecker's Constitutional right to procedural due process through the Fifth and the Fourteenth Amendments.

B. In Applying the Relevant Standards for Recusal, Disqualification is Appropriate When the Charges are Supported By Facts Providing a Reasonable Basis to Doubt the Judge's Impartiality.

A recusal motion is a serious matter, "strik[ing] at the integrity of the judicial process." ***In re International Business Machines Corp.,*** 618 F.2d 923, 927 (2d Cir. 1980) ***("In re IBM").*** The applicable standard for reviewing a denial of a recusal motion pursuant to 28 U.S.C. §455(a) is an abuse of discretion. ***United States v. Smith,*** 997 F.2d 674 (10th Cir. 1993); ***United States v. Burger,*** 964 F.2d 1065, 1070 (10th Cir. 1992); ***Weatherhead v. Globe,*** 832 F.2d 1226, 1227 (10th Cir. 1987); ***In re Drexel Burnham Lambert, Inc.,*** 861 F.2d 1307, 1312 (2d Cir. 1988). Application of this standard requires a balancing of two competing policy considerations. First, the "courts must not only be, but seem to be, free of bias or prejudice", ***In re United States,*** 158 F.3d 26, 30 (1st Cir. 1998) ***(quoting In re United States,*** 666 F.2d 690, 694 (1st Cir. 1981); and second, the fear recusal on demand would provide litigants with a veto against unwanted judges. ***Id.*** Consequently, disqualification is appropriate when the charge is supported by a factual basis and when the facts asserted "provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." ***In re United States,*** 666 F.2d at 695.

District court judges are routinely allowed a "range of discretion" in the decision not to recuse. ***Id.*** However, a district court should exercise this discretion with the understanding, "if the question of whether §455(a) requires disqualification is a close one, the balance tips in favor of recusal." ***Nichols v. Alley,*** 71 F.3d 347, 352 (10th Cir. 1995).

In this case, the scales tipped in favor of recusal with the simple standard requiring only the appearance of prejudice and bias. Only an unreasonable person, when faced with the myriad of facts demonstrating partiality, refuse to disqualify himself, and ergo, abuse his discretion. This abuse is only surpassed by the Third Circuit Court of Appeals, in

determining Judge Davis' ". . . connections with the defendants [did] not create [ ] an appearance of impartiality," (app. at 6a), but then allowing Judge Davis to dismiss the case is inconsistent with the application of the standard necessary to require disqualification. Hence, a reasonable person, not the politically astute individual, would not accept the intertwining of politics with the judiciary and allow a judge who has failed to display any impartiality to remain on the case.

C. To Insure Freedom from Both Bias-in-Fact and the Appearance of Bias, Congress has Adopted Two Alternate and Independent Statutes Which Require Judicial Disqualification for Bias, 28 U.S.C. §144 and 28 U.S.C. §455.

Every person who is to become a member of the federal judiciary takes the oath prescribed by 28 U.S.C. §453 requiring one "administer justice without respect to persons, and do equal right to the poor and to the rich, 'faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and the laws of the United States." 28 U.S.C. §453. Consequently, it is essential all litigants have their cases heard by judges mindful of this oath. ***Laird v. Tatum,*** 409 U.S. 824, 838, 93 S.Ct. 7, 15, 34 L.Ed 2d 50 (1972).

To insure this, in 1911, Congress adopted 28 U.S.C. §144, which provides,

> Whenever a party to any proceeding in a district court makes or files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reason for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it

> within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §144. Courts have uniformly held the language "personal bias or prejudice" in §144 required recusal only for bias personally acquired, as opposed to judicial bias. ***United States v. Grinnell Corp.,*** 384 U.S. 563, 583 (1966).

Congress adopted §455 in 1970, and amended it in 1974 to "improve judicial machinery by . . . broaden[ing] and clarify[ing] the grounds for judicial disqualification." House Report at 6357.

Section 455 of title 28 United States Code, states in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances.
> (1) Where he has a personal bias or prejudice concerning a party . . ..

28 U.S.C. §455(a)(b)(1).

Section 455(a), as amended, abandoned the "duty to sit" rule, which urged judges to resolve questions of recusal in favor of a "duty to sit." House Report at 6355. The new §455(a) requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. §455(a). Indeed, §455(a) recognizes the appearance of impartiality is so central to notions of justice that any question of bias is sufficient to require recusal under that section. ***See Liljeberg,*** 486 U.S. at 861 (requiring recusal even where judge was unaware of disqualifying circumstances). ***Robert v. Bailar,*** 625 F.2d 125, 129 (6th Cir. 1980) (disqualification required even where question is close); ***Potashnick,*** 609 F.2d at 1111 ("[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions").

Section 455(b) enumerates five instances which mandate the disqualification of a judge; the only subdivision relevant to this case is §455(b)(1), which requires recusal where a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts discerning the proceeding." 28 U.S.C. §455(b)(1).

Disqualification, in this case, is necessary under all three provisions. Section §455 (a) recognizes the appearance of impartiality is so central to notions of justice any question of prejudice or bias requires recusal. Judge Davis' initial attempt to conceal his prior association with Ballard Spahr, i.e. his published resumes lacked any reference to Ballard Spahr, when discovered, required disqualification. Further, once Mr. Heimbecker discovered the material misrepresentations Judge Davis made to the Senate regarding his employment at Ballard Spahr, i.e. whether Judge Davis ever entered his appearance on behalf of Raymark Corporation, an actual prejudice and bias arose from an extra judicial source, requiring disqualification. Finally, under §455(b)(4), Judge Davis should have sua sponte disqualified himself once he failed to provide the docket numbers and dates at Mr. Heimbecker's request. This failure was a violation of the Code of Judicial Conduct.

The American Bar Association in 1990, in revising the Code of Judicial Conduct, added an important provision regarding judicial disqualification in the commentary to the Code. The ABA added judges are to disclose ". . . on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge does not personally feel that the information implies that recusal is necessary." ***Model Code of Judicial Conduct*** 3E (1990).

D. Recusal is Necessary Pursuant to §455 because the Facts Presented Would Lead a Reasonable Person to Infer Bias or Prejudice Exists Foreclosing Impartiality of Judgment.

"Section 455(a) is a self-enforcing statutory standard for disqualification for a judge." ***United States v. Miranne,*** 688 F.2d 980, 985 (5th Cir. 1982). The United States Court of Appeals for the Fifth Circuit has noted an actual demonstrated prejudice need not exist under §455 to warrant a judge to recuse himself when his impartiality might reasonably be questioned. ***Id.*** Consequently, §455 is the general safeguard for the appearance of impartiality. ***Lovoi v. Treasure Chest Casino,*** (1998 WL 1986950 E.D. La.). As the United States Supreme Court stated, "what matters under §455(a), 'is not the reality of bias or prejudice but its appearance.'" ***Microsoft Corporation v. United States,*** et al, 530 U.S. 1301, 121 S.Ct. 25, 26, 147 L.Ed.2d 1048 (2000), ***citing, Liteky v. United States,*** 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (a party seeking recusal need not show actual bias on the part of the court, only the possibility of bias.).

In doing so, §455 employs a reasonable man standard. ***Potashnick v. Port City Constr. Co.,*** 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980). ***See generally*** 13A Charles A. Wright et al., ***Federal Practice and Procedure*** §3542 at 557 (1984, Supp. 1992 and Supp. 2003).

"The standard under §455 is objective and requires the court to ask 'whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" ***Bolin v. Story,*** 225 F.3d 1234, 1239 (11th Cir. 2000), ***quoting McWhorter v. City of Birmingham,*** 917 F.2d 570, 578 (11th Cir. 1990). ***MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.,*** D.C.N.Y. 2002, 205 F.Supp.2d 158, 161 n.8, ***quoting Wright, Miller & Cooper.***

The test is whether the facts presented, assuming their truth, would lead a reasonable person reasonably to infer

bias or prejudice exists which would foreclose impartiality of judgment. ***United States v. Corr,*** 434 F.Supp. 408, 412-413 (S.D.N.Y. 1977) ***(See State of Idaho v. Freeman,*** 478 F.Supp. 33 (D. Idaho 1979). ***Baker v. City of Detroit,*** 458 F.Supp. 374 (S.D. Mich. 1978); ***United States v. Conforte,*** 457 F.Supp. 641 (D. Nev. 1978). Therefore, under §455(a), "if a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality' under the applicable standard, then the judge must recuse." ***United States v. Antar,*** 53 F.3d 568, 574 (3d Cir. 1995) ***(quoting, In Re Larson,*** 43 F.3d 410, 415 (8th Cir. 1994).

Quite simply, in applying the test under §455 to the facts in this case, Judge Davis should have disqualified himself at the first opportunity. In fact, the Third Circuit agreed stating, ". . . we believe a reasonable person would not view Judge Davis' alleged connections with the defendants as evidencing or creating an appearance of impartiality," but denied the writ of mandamus. The decision of the Third Circuit, in allowing Judge Davis to remain on this case, seriously jeopardized Mr. Heimbecker's rights to procedural due process.

E. Recusal is Essential Pursuant to §144 because the Court's conduct has Manifested Personal Bias and Prejudice.

Courts have uniformly held the language "personal bias or prejudice" in §144 required recusal only for bias personally acquired, as opposed to judicial bias. ***United States v. Grinnell Corp.,*** 384 U.S. 563, 583 (1966). Section 144 provides a judge shall recuse himself when a party has filed a timely and legally sufficient affidavit showing the judge before whom the matter is pending has a personal prejudice against the party or a bias in favor of any adverse party. ***Apple v. Jewish Hospital and Medical Center,*** 829 F.2d 326, 333 (2d Cir. 1987). Recusal motions are to be lodged in a timely fashion because the absence of such a requirement would result in increased instances of wasted judicial time and resources, ***In re IBM,*** 618 F.2d at 933, and a heightened risk litigants would use recusal motions for strategic

purposes. ***Ex parte American Steel Barrel Co. and Seaman,*** 230 U.S. 35, 44 , 33 S.Ct. 1007, 1010, 57 L.Ed. 1379 (1913).

"[I]t is well settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." ***Apple,*** 829 F.2d at 333; ***see also In re Martin Trigona,*** 573 F.Supp. 1237, 1244 (D. Conn. 1983). (One seeking recusal must do so at the earliest possible moment after he obtains the knowledge that forms the basis for the motion."). Ultimately, then, all petitions for recusal require a threshold requirement of good faith on the part of the petitioner, which is implicit in the timeliness of the motion. ***In re San Juan Dupont Plaza Hotel Fire Litigation,*** 129 F.R.D. 409, 418 (D. Puerto Rico 1989).

In this case, the issue of Judge Davis misrepresentations regarding his employment with Ballard Spahr was presented within five days of the reassignment of this case from Judge Dalzell to Judge Davis. At no time did Mr. Heimbecker sit back with the knowledge that formed the basis for both recusal motions and do nothing. Instead, Mr. Heimbecker aggressively sought the cooperation of Judge Davis, Ballard Spahr, Fryman and even Judge Becker to clarify and confirm the information Mr. Heimbecker has gleaned. Rather than facilitate, all have obstructed the search for the truth.

The Supreme Court explained, with reference to the statutory predecessor to section 144.

> It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause.

Ex parte Am. Steel Barrel Co., 230 U.S. at 43-44, 33 S.Ct. at 1010.

The basic doctrine was repeated in ***Berger v. United States,*** 255 U.S. 22, 31 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921), and has been cited by the Court of Appeals as support for "the general proposition that the bias which requires recusal must be personal and cannot rest upon trial rulings or conduct." ***In re IBM,*** 618 F.2d at 929. See also ***Davis v. Cities Service Oil Co.,*** 420 F.2d 1278, 1282 (10th Cir. 1970) (allegedly cumulative revelation of bias does not justify untimeliness of disqualification motion; "[p]romptness in asserting disqualification is required to prevent a party from awaiting the outcome before taking action."); ***Peckham v. Ronrico Corp.,*** 288 F.2d 841, 843 (1st Cir. 1961) (litigant should not be permitted to "sampl[e] the temper of the court before deciding whether or not to file an affidavit of prejudice.").

The disqualification procedure set forth in §144 not only requires the affidavit filed by a party to be timely but must also be legally sufficient. ***McCann v. Communications Design Corporation,*** 775 F. Supp. 1506, 1527 (D. Conn. 1991). Our Court of Appeals has held sections 144, 455(a) and 455(b)(1) look to extrajudicial conduct as the basis for determining whether a judge should disqualify himself, not to "what [the] judge has learned from or done in the proceedings before him," ***King v. United States,*** 576 F.2d 432, 437 (2d Cir. 1978), or, in other words, conduct which arises within a judicial context. ***Apple,*** 829 F.2d at 333; ***In re IBM,*** 618 F.2d at 928-29.

A trial judge's alleged prejudice "must arise by virtue of some factor which creates partiality arising outside of the events which occur in the [case] itself." ***In re IBM,*** 618 F.2d at 927; ***see id.*** at 928-29; ***King,*** 576 F.2d at 437. By "extrajudicial conduct" the cases do not mean to say conduct arising geographically outside of the courtroom, but rather, conduct arising from something outside of rulings or statements made by the trial judge in the course of his judicial duties. ***Id.; Allen-Myland v. International Business Machines***

Corp., 709 F.Supp. 491, 494 (S.D.N.Y. 1989).

The test is the same under both sections 144 and 455: "'The determination should be made on the basis of conduct extrajudicial in nature as distinguished from conduct with a judicial context.'" ***In re IBM,*** 618 F.2d at 928 (quoting ***Davis v. Board of School Comm'rs,*** 517 F.2d 1044, 1052 (5th Cir. 1975), ***cert. denied,*** 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976)). Or, as the Supreme Court has held, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." ***United States v. Grinnell Corp.,*** 384 U.S. 563, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). While the Court of Appeals concedes "that conduct in the course of a trial might be relevant to indicate a bias that can only be explained as a personal prejudice against a party, the fact is that no case in this circuit has ever found such bias on the basis of a trial court's rulings or conduct. This reticence . . . is well justified." ***In re IBM,*** 618 F.2d at 928 n.6.

Most important, the source of the partiality is always essential to the analysis of a disqualification motion. Thus, the facts in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." ***Berger v. United States,*** 255 U.S. at 41.

If the Third Circuit Court of Appeals had disqualified Judge Davis when Mr. Heimbecker sought relief, the conduct in the course of the proceedings would not be relevant. As a result of this failure, despite jurisdiction resting with the Third Circuit, Judge Davis' prior instructions to Mr. Heimbecker not to communicate with him while a writ of mandamus was pending and his ex parte communication with the court of appeals, Judge Davis dismissed Mr. Heimbecker's case. Such conduct is egregious, a violation of Mr. Heimbecker's procedural due process rights under the United States Constitution, that, in and of itself, justifies disqualification.

F. The Failure of the Trial Court and the Third Circuit Court of Appeals to Comply with §144 and §455 Irreparably Harms the Public Confidence in the Judiciary.

Canon 2A of the ***Code of Conduct for United States Judges*** states, "a judge should respect and comply with the law and should act at all times in a manner that promotes public confidence and impartiality of the judiciary. Thus 28 U.S.C. §455(a) requires "[a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a).

"Moreover advancement of the purpose of the provision [is] to promote public confidence in the integrity of the judicial process, ***see,*** Rep. No. 93-419,p.5 (1973); H.R.Rep.No. 93-1453,p.5 (1974) does not depend upon whether or not the judge actually knew of facts creating an appearance of impartiality, so long as the public might reasonably believe that he or she knew." ***Liljeberg v. Health Service Acquisition Corp.,*** 486 U.S. 847, 859-60, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988).

Congress expressly intended the amended §455 to promote public confidence in the impartiality of the courts by requiring judicial disqualification when a judge's impartiality could reasonably be questioned." ***United States v. State of Alabama,*** 2 F.2d 1532, 1541 (11th Cir. 1987), ***cert. denied sub nom., Board of Trustees of Alabama State University v. Aubrun University,*** 108 S.Ct. 2857 (1988). "The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective ['in the opinion of the judge'] standard with an objective test." ***Liljeberg,*** 486 U.S. at 858 n.7. The Eleventh Circuit agreed holding "under §455(a) an actual demonstrated prejudice need not exist in order for a judge to recuse himself . . .". ***United States v. Alabama,*** 2 F.2d at 1541.

In ***United States v. Cooley,*** 1 F.3d 985, 993 (10th Cir.

1993), the Court pointed out, "[i]n applying §455(a), the judges actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." ***Cooley,*** 1 F.3d at 993. "The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judges impartiality into question." ***Id.***

As a result, under §455(a), judges are disqualified from continuing to hear any case where a reasonable person could question their objectivity. Most importantly, ". . . a judge has a continuing duty to recuse before, during, or in some circumstances, after a proceeding, if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality." ***U.S. v. Cooley,*** 1 F.3d 985, 992 (10th Cir., 1993), ***citing, Liljeberg v. Health Services Acquisition Corp.,*** 486 U.S. 847, 861, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988).

Ultimately, §455(a), by providing for recusal when a judge's impartiality may reasonably be questioned, the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted requires "justice must satisfy the appearance of justice" and thus protects the rights of the citizens. ***Alexander v. Primerica Holdings Inc.,*** 10 F.3d 155, 162 (3rd Cir. 1993) ***quoting In re Asbestos Litigation,*** 977 F.2d 764, 776 (3rd Cir. 1992).

Finally, the purpose of 28 U.S.C. §455 (a) and (b)(4) and 28 U.S.C. §144 were enacted with the intention of protecting the public confidence in the integrity of the judiciary. The public's confidence in the judiciary is only protected when the individual, standing before this court, is accorded due process. Due process entitles a person to an impartial and disinterested tribunal. The failure of Judge Davis to disqualify himself, the inaction on the part of the Third Circuit Court of Appeals is inconsistent with the wording, history and policy underlying sections 455 (a) and (b)(4) and 144.

CONCLUSION

Mr. Heimbecker has set forth a myriad of facts, when applied collectively, require the disqualification of Judge Davis. This Court can not ignore the ties existing between the political, legal and the judicial power bases when they affect the rights of the individual. Judges and the society as a whole must be concerned about the accountability of a federal judge in a system which immunizes him from criticism for prejudice merely because it arises during the course of the proceedings. Specifically, Judge Davis' conduct in misrepresenting his prior employment with Ballard Spahr presented the appearance of prejudice and bias. Further, his ongoing egregious conduct manifests an actual prejudice and bias, foreclosing any impartiality. It is the duty of the judiciary to enforce the legislatively mandated provisions sections 455 (a) and (b)(4) and 144 and disqualify Judge Davis.

Respectfully submitted,

H. Gerard Heimbecker

Date: April 26, 2003 H. Gerard Heimbecker, Petitioner